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893903—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 232

ROBERT E. FUNKHOUSER AND ELEANOR E. FUNKHOUSER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Tax Court rendered no opinion. The opinion of the Court of Appeals (Pet. 3a–4a) is reported in 226 F. 2d 910. The opinion denying a rehearing (Pet. 7a–8a) is reported in 231 F. 2d 657.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1955. (Pet. 3a.) A petition for rehearing was denied on April 9, 1956. (Pet. 7a–8a.) The petition for a writ of certiorari was filed on July 5, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the court below erred in affirming the order of the Tax Court declining to vacate its decision which had been entered pursuant to an agreement of the parties in settlement of the case.

STATEMENT

On February 4, 1953, the Commissioner duly served on the taxpayers, Robert E. Funkhouser (referred to hereinafter as the taxpayer) and his wife, Eleanor E. Funkhouser, a statutory notice of deficiency with respect to their income tax liability for the calendar years 1941 through 1947, determining deficiencies of $179,391.73 and $93,129.46 in penalties. (R. 10.)[1] On April 29, 1953, the taxpayers filed a petition for redetermination by the Tax Court. (R. 7.) Thereafter, extensive negotiations took place which culminated in a settlement of the case, which was embodied in a stipulation between the parties filed with the Tax Court on November 16, 1954, for the entry of a decision. (R. 11–14.) On November 24, 1954, the Tax Court entered its decision in accordance with the written stipulation of the parties. (Pet. 1a–2a.)

On February 23, 1955, the taxpayers filed a petition for review by the Tax Court, and on March 16, 1955, a hearing was held thereon. (R. 8.) The Tax Court, construing this document in a manner most favorable to the taxpayers, treated it as a motion to vacate and set aside its decision of November 24, 1954. It lim-

[1] Record references are to the appendix to the Commissioner's brief in the court below.

ited its hearing thereon to the question whether the action of the taxpayers' counsel in stipulating for the entry of decision exceeded the scope of his authority or whether there was any fraud, over-reaching, or other grounds for vacating its decision.[2] (R. 14–19.) At the hearing it was developed that the taxpayer was represented by an attorney, Lewellyn A. Luce, who was assisted by another attorney, Warren G. Roberts, in the negotiations leading to the settlement of the case. (R. 24, 33–34.) The taxpayer was granted some nineteen formal conferences with representatives of the Commissioner, at most of which he was present along with his counsel. (R. 20–21.) The taxpayer took an active part in the discussions and was fully advised as to the basis of the settlement and the various items involved. (R. 22–24, 28–33, 35–42.)

Mr. Luce, the taxpayer's attorney, testified that the stipulation, pursuant to which the decision of the Tax Court effecting the settlement of the case was entered, was fully discussed with the taxpayer; that the taxpayer was given an opportunity to examine it thoroughly; and that the taxpayer specifically directed him to sign the stipulation and file it. (R. 29, 30.) The settlement made in the case enabled the taxpayer for $107,955 to dispose of, without litigation, a liability for taxes and penalties determined against

[2] None of the matters relating to the taxpayer's criminal prosecution for income tax evasion referred to in the petition for certiorari (pp. 3–5, 8, 11, 12, 14–15) and set forth at length in the appendix thereto (pp. 21a–47a, 52a–53a) were made a part of the record in this proceeding, and therefore were not referred to by the Tax Court or the court below.

him in the statutory notice of deficiency in the amount of $272,521. (R. 10, 26.) Mr. Luce testified that he recommended acceptance to the taxpayer because he felt it was a good settlement, and not "on account of any lack of fee or anything of that kind." (R. 32.) Chief Judge Kern, who presided at the Tax Court hearing (R. 51), specifically inquired of the taxpayer whether he wished to give any testimony in contradiction of that given by Mr. Luce, to which the taxpayer replied, "I have no argument with what Mr. Luce testified to" (R. 33). The Tax Court concluded that no basis had been established for vacating and setting aside its decision entered on November 24, 1954, pursuant to stipulation of the parties, and denied the taxpayers' petition. (R. 50–51.)

The court below, on November 7, 1955, affirmed the Tax Court's order refusing to vacate its decision. (Pet. 3a–4a.) The taxpayers subsequently filed a petition for rehearing based upon alleged newly discovered evidence, upon which briefs were filed and oral argument had. On April 9, 1956, rehearing was denied by the court below. (R. 5a–6a, 7a–8a.)

ARGUMENT

The decision below is correct. The facts detailed above make it clear that petitioners' allegations of injustice are wholly without foundation. Their claims of fraud and coercion were painstakingly reviewed by the courts below, and were found to be lacking in substance. No conflict in decisions is asserted, and no other grounds for further review exist.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 232

ROBERT E. FUNKHOUSER AND ELEANOR E. FUNKHOUSER,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITIONERS REPLY TO RESPONDENTS BRIEF IN OPPOSITION TO PETITION

Respondent's argument and conclusion in the brief he filed in opposition to the petition in this case are based on his incorrect quotation of the recorded testimony.

Respondent, in his brief (Page 4.) quotes the counsel who signed the stipulation as testifying that he did not recommend the acceptance "On account of any lack of fee or anything of that kind" (Respondent's brief in opposition to this petition, page 4.) and then Respondent quotes the Petitioner as replying to the Tax Court

judge as follows "I have no argument with what Mr. Luce testified to". (Respondent's brief in opposition to this petition, page 4.)

Respondent's quotations are deceptive, incomplete and quoted out of context. Respondent's references to the record are also deceptive, in that his quotations, such as (R. 32.) do not refer to the official record of the testimony before the Tax Court but they refer to Respondent's own brief in which he printed excerpts from the record, which he filed in the Court below (See the note at the bottom of page 2 of Respondent's brief in opposition to this petition) and they are not *correct quotations* of the official record.

The official Record of the hearing before the Tax Court on March 16, 1955 *correctly quoted* is as follows:

(Official Record of Tax Court Hearing Page 52)

Q. Mr. Luce, did you ever give me any list of the disallowed items in this case?

A. Mr. Funkhouser, I never had a list. What we gave you and what you looked over and what you prepared yourself, helped prepare was this long analyses, prepared by Mr. Roberts in these conferences of these checks right down the line. Now I will tell you why I didn't give you a list: Because we had this analyses and in the second place because the government didn't give me any list; and as a matter of fact they didn't have a list and didn't make it up and the settlement was finally effected as Mr. Butrum described it, by an arbitrary decision of these items in dispute. So I didn't have any list of them, I just had the figure.

MR. FUNKHOUSER: No further questions.

MR. WARING: You may be excused.

THE COURT: Step down.

> THE COURT: May I ask Mr. Funkhouser if he has any testimony, whether he wishes to give any testimony in contradiction of the testimony of Mr. Luce who has just testified, with particular reference with his employment as counsel, his authority to act, his consultation with you in regard to the settlement and his acknowledgment of you with regard to the settlement figure?
>
> MR. FUNKHOUSER: I have no argument with what Mr. Luce testified to.

That testimony, when correctly quoted, shows that Mr. Luce had just testified that Respondent has assessed these taxes and penalties and forced this "arbitrary decision" without ever making up, or having any list of the items on which the stipulation and decision were based (R. 53.)[1] (Pet. 61a.)[2]

This is an important case. If this Court permits this decision to stand, and permits Respondent to assess these taxes and penalties and force their payment as described by him in his testimony as recorded in this record then every taxpayer (everyone in the United States will have lost his liberty and property). If this decision is not reversed by this Court then the record will show that fourteen years after the taxpayer filed income tax returns in which he reported all of his gross income and all of his expenses, Respondent, without making any inquiry about the particular items, inquiring about the specific checks, making any audit, tabulation, calculation, count, list or any attempt to analyze the items or estimate the number of items

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[1] Record References (R. 53.) used in this brief are to the official Record of the Hearing before the Tax Court on March 16, 1955.

[2] References to the Petition (Pet. 61a.) are to the Petition filed in this Court in this case.

involved, forced this "arbitrary decision" by having the taxpayer fined, imprisoned, and kept in prison without parole for not paying the taxes Respondent proposed to assess, then making a dozen different claims and placing assessments, attachments and liens on all of the taxpayer's property and seizing and taking all of his property and money. This decision was so forced by Respondent as is clearly shown by his recorded testimony.

Respondent's testimony shows that Respondent testified that he found all of Petitioners gross income reported in the income tax returns filed (R. 13.) (Pet. 25a), 31a, 63a.) and that all expenses were reported and "that 95 per cent of those expenses was found to be allowable. Those were allowed. There was no question about it. They were allowed as deductions from gross income". (R. 14.) (Pet. 31a, 64a.) and the other 5 per cent of the expenses were reported in such great detail that they were never even counted and no list was ever made of them. (R. 14-15, 34, 26, 57, 43, 27, 53.) (Pet. 6, 7, 31a-47a, 50a-61a, 62a, 63a-64a.) There was no question about this. It was repeated over and over again.

Respondent's testimony shows that the items on which the stipulation and decision were based were not even counted or any "attempt made to analyze them" (R. 27.) (Pet. 50a.) and Respondent's witnesses just estimated them to number:

3,000 as estimated by Mr. Waring (R. 15.) (Pet. 7, 64a.)

7,000 as estimated by Mr. Butrum (R. 26.) (Pet. 55a.)

10,000 as estimated by Mr. Waring (R. 15.) (Pet. 64a.)

14,000 as estimated by Mr. Roberts (R. 57.) (Pet. 62a.)

2 or 3 suitcases full as estimated by Mr. Luce (R. 57.) (Pet. 59a.)

20 or 30 thousand as estimated by Mr. Butrum (R. 27.) (Pet. 56a.)

The record shows that Respondent testified that he not only made no list or count of the items he disallowed for the assessment of these taxes and penalties but that he also made no "attempt to analyze some 20 or 30 thousand individual items" on which he based his assessment (R. 27.) (Pet. 56a.) nor did he make any audit, calculation or tabulation (Pet. 31a-32a.) or any inquiry about the particular items on which the decision was based (Pet. 32a.) or any inquiry about the particular checks (Pet. 32a.) and he testified that he disallowed many allowable items such as "all automobile expenses in the entirety" (Pet. 33a.) items never expensed (Pet. 33a.) disallowed checks for depreciable items but allowed no depreciation on them (Pet. 34a.) and knowingly testified falsely as to the date of the sale and as to Petitioner's contentions as to the use of some of the property (Pet. 35a-41a.) and then he made no audit, tabulation or calculation (Pet. 31a-32a.) but just "assumed" that some taxes might be due (Pet. 45a-46a.) and on that "assumption" he based the assessments he made in this case some fourteen years after the returns had been filed.

The record shows that without doing any of those elementary things for the proper assessment of any taxes and penalties Respondent then used the strongest kind of pressure to force the signing of the stipulation which he desired (R. 25.) Respondent had Petitioner fined $25,000, imprisoned, and kept in prison